And it properly should be the right of any putative class member, under the First Amendment, FED. R. CIV. P. 23 and the Due Process Clause, to communicate with Elwood Simon *before finding class counsel unacceptable*. To suggest that the right to opt out should be denied or that virtual representation exists because an individual consults with class counsel turns Rule 23 and all notions of Due Process on their heads.

The fact (if proven) that the AUO "persuaded" (whatever that means) 59 petitioners to withhold mortgage payments (Brief, p. 7) certainly suggests a privileged communication. Moreover, that has nothing whatsoever to do with whether Merrill is entitled to foreclose future litigation against members of a putative class of securities claimants who opted out of the class action. Why remand for such a finding of fact? The issue, under a virtual representation theory, is not whether the AUO "persuaded" members to take unrelated legal action, but the extent to which those members actually participated in and controlled the class action.

The fact that Grady consulted with Simon, and their objectives initially did not differ (a situation to be found in any class action), hardly suggests that Grady's clients should be precluded from opting out of the proposed settlement *against* Simon's wishes and *against* Simon's advice. If FED. R. CIV. P. 23 means anything, it is that clients have a right to separate counsel on the issue of opting out and a *right* to their own choice as to whether to accept a class settlement. That would be true *even if Simon was their attorney in fact and their only attorney in fact*. Neither class counsel nor the district court owns the chose in action -- only the individual plaintiffs -- and it is those individual plaintiffs who are constitutionally vested with Due Process rights.

In sum, the thrust and scope of post-remand fact-finding is now clear. The post-remand fact-finding directed by the Sixth Circuit and pursued by Merrill will run roughshod over the First Amendment and Due Process rights of Petitioners. The operative "facts" suggested by the Sixth Circuit grossly distort the effect of FED. R. CIV. P. 23. This is not a case in which a favorable post-remand determination by the district court might render moot the issues presented in the petition. The very process of remand threatens violation of Petitioner's First Amendment and Due Process rights, as well as the rule and the spirit of FED. R. CIV.

P. 23.[5] These issues are ripe. The Petition is proper for review.

II. PETITIONERS' PARTICIPATION IN THE CLASS ACTION LIMITED TO SPECIFIED CLAIMS AGAINST THE SSG DEFENDANTS DID NOT PROVIDE PERSONAL JURISDICTION TO THE DISTRICT COURT FOR AN ACTION AGAINST RESPONDENTS, BECAUSE JURISDICTION OBTAINED PURSUANT TO FED. R. CIV. P. 23(c)(4)(A) IS LIMITED TO THE CLAIMS AND PARTIES THAT ARE PART OF THE LIMITED CLASS ACTION

A court, pursuant to FED. R. CIV. P. 23(c)(4)(A), may certify a class on a particular or limited issue. When a court does certify a class for such a limited purpose, however, "other issues [are] to be adjudicated on an individual basis."[6] 7B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1790, at 274 (1986). *See e.g., In Re A.H. Robins Co., Inc.*, 880 F.2d 709 (4th Cir.) *cert denied*, 493 U.S. 959 (1989); *Sullivan v. Chase Investment Services of Boston, Inc.*, 79 F.R.D. 246 (N.D. Ca. 1978).

Section (c)(4) of Rule 23 specifically states: "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues. . . . This clearly means that the district court may take only those parts of a lawsuit which lend themselves to convenient use of the class action motif." *Nix v. Grand Lodge of Int Ass'n of Mach. & Aero. Wkrs.*, 479 F.2d 382, 385 (5th Cir. 1973).

---

[5] The Court's grant of certiorari in *Matsushita Electric Industrial Co., Ltd. v. Epstein*, (Dkt. No. 94-1809), confirms Petitioners' assertion that the parameters of FED. R. CIV. P. 23 coupled with due process concerns are issues of importance to jurisprudence, as well as the public.

[6] The Ninth Circuit recognized the evil that may result when the strictures of Rule 23 are not complied with: "The class action device, while capable of the fair and efficient adjudication of a large number of claims, is also susceptible to abuse and carries with it certain inherent structural risks. . . . 'Class actions are unique creatures with enormous potential for good and evil.' . . . Consequently, FED. R. CIV. P. 23 establishes a procedural framework designed to protect against the shortcomings of the class action device." *Officers for Justice v. Civil Service Com'n*, 688 F.2d 615, 623 (9th Cir. 1982).

In this respect, the personal jurisdiction a court obtains over a plaintiff class via FED. R. CIV. P. 23 (c)(4)(A) is limited, similar to the limited personal jurisdiction obtained via a state long arm statute.[7] Long-arm statutes allow personal jurisdiction, limited to claims arising out of the act or acts creating the jurisdictional relationship between the defendant and the state. *Wulf Oil Corp. v. Grebe Drilling Co.*, 93 Mich. App. 793, 287 N.W.2d 344 (1979). For example, while a party's commission of a tort within the state of Michigan subjects him to the limited personal jurisdiction of a Michigan court for the tort, the Michigan court does not obtain personal jurisdiction for other actions, *i.e.*, a divorce action, a contract action, et cetera. *Id.* Similarly, while the District Court obtained limited personal jurisdiction relating to Petitioners' contract claims against the SSG defendants pursuant to FED. R. CIV. P. 23, it did not, by virtue of the contract claim, obtain personal jurisdiction over Petitioners for other actions against other non-SSG defendants.

Neither of the principal Respondents (Merrill and Trustbank) were even parties to the claims presented by the certified class. While those Respondents correctly note that commencement of suit against a defendant subjects the plaintiff to potential counterclaims of that defendant, a plaintiff's commencement of a suit against a defendant **does not subject the plaintiff to the potential "counterclaims"/claims of a non-defendant.**[8] The chart of the parties in the instant litigations illustrates the flaw in Respondents' assertion. See Appendix B.

It is absurd to suggest that, because Petitioners were part of Case I, they are bound by the final decision in Case II when Case II was never certified as a class action pursuant to FED. R. CIV. P. 23(b); Petitioners were not Plaintiffs in Case II, and the Defendants in Case II were not a party to Case I. Yet, that is precisely Respondents' argument.

The District Court clearly recognized the impropriety of this assertion when it ordered certification to occur for the limited

---

[7] While there is no federal equivalent, the federal courts generally adhere to the long-arm statute of the state in which it sits. *See e.g., The Brake Shop, Inc. v. Dacey*, 793 F. Supp 154 (E.D. MI. 1992).

[8] Neither the cases cited by Respondents, nor any cases for that matter, support the contrary.

purpose of settlement in February, 1992. There would be no need for such certification at that time, if the court already had jurisdiction over all of the putative class members. Additionally, the court initially criticized Merrill for even suggesting that putative class members would be bound without certification, aptly characterizing Merrill's assertions as "shifty."[9]

Adam v. Saenger, 303 U.S. 59, 58 S.Ct. 454, 82 L. Ed. 649 (1938), cited in Respondents' briefs, offers no support for their assertion that Petitioners consented to the jurisdiction of the district court for anything other than the specified contract claims against the SSG defendants (and any counterclaims asserted by the SSG defendants). The *Adam* Court held the Fourteenth Amendment does not preclude the service of a defendant's counterclaim upon counsel for plaintiff as a condition to permitting plaintiff's use of the state court. *Id.* at 67-8. *Adam* is easily distinguished from the instant case because: 1) Respondents were not defendants to the only class claim in which Petitioners were a party (Case I); 2) Respondents did not assert a counterclaim, or any claim for that

---

[9] Mr. Egan: Dennis Egan appearing on behalf of Merrill Lynch. Merrill Lynch has -- has one concern, is talking class certification on two narrow issues, which we don't think is necessary. We believe the Court can try the case as to these individual Plaintiffs, and in fact, if the Plaintiffs fail to prove their case, that's the end of the case. We don't need to get into notice. We don't need to get into opt-outs, all of which will have to be accomplished before any trial begins.

The Court: Well, Mr. Egan, how do you handle this? *Those parties who are not parties right now, who are not Plaintiffs right now, we want finality as to them, don't we? I don't want to go through this expedited trial involving only the Becherer Plaintiffs, and then have some other unit holders come along a couple of months from now and say, well we weren't a part of that lawsuit, and we're all ready to go, Judge. We want finality here, don't we.*

Mr. Egan: Your Honor --

The Court: *They ought - they ought either to be in or out of this case.*

Mr. Egan: We have two concerns. First, one, that finality could be dealt with at the conclusion of the case and may well be collateral estoppel on other persons anyway, be -- but --

The Court: That's a ***shifty*** kind of -

[March 12, 1991 Status Conference, at pp. 26-29 (emphasis added).]

matter, against Petitioners; and 3) *Adam* is distinguishable because it did not involve a class action, much less a limited class action pursuant to FED. R. CIV. P. 23(c)(4)(A).[10]

If the Court accepts Respondents' theory that the District Court obtained general personal jurisdiction over Petitioners by their implied consent to try the contract claims--it will create a major disincentive to any plaintiff to allow any claim to be tried by a class action. In effect, despite the notice, class counsel would obtain complete control over the entire chose and all related claims--a clear deprivation of property without due process of law, as well as a clear breach of "traditional notions of fair play and substantial justice," the defining standard of due process constraints. *International Shoe Co. v. Washington,* 326 U.S. 310, 66 S.Ct. 154, 90 L. Ed. 95, 102 (1945).

Merrill essentially argues that if a putative class plaintiff consents to have any claim against any defendant tried in a class action, that plaintiff consents to having all claims tried in the same action. That proposition cannot be reconciled with the notice provision of FED. R. CIV. P. 23, with the general purpose of class actions, nor, in particular, with the notice the District Court provided to the Petitioners in the instant case.[11]

The fact that "[m]any petitioners did not [opt out] and became members of the distinct provisional settlement class" [Merrill, p. 9 (emphasis added)] should not be used to foreclose their rights now. Indeed, the very fact that the certified class was "provisional" makes clear that the district court acquired jurisdiction over Case II pursuant to separate and independent certification in 1992, over

---

[10] Similarly, Respondents reliance on *General Contracting & Trading Co. v. Interpole, Inc.*, 940 F.2d 20 (1st Cir. 1991); *Gutor Int'l. A.G. v. Raymond Parker Co., Inc.*, 493 F.2d 938 (1st Cir. 1974); *Irving Trust Co. v. Nationwide Leisure Corp.*, 562 F.Supp 960 (S.D.N.Y. 1982) and *Dewey & Almy Chemical Co. v. Johnson, Drake & Piper, Inc.*, 25 F.Supp 1021 (E.D.N.Y. 1939) is misplaced.

[11] The Notice of Pendency of Class Action clearly stated: "THE COURT'S ORDER GRANTING CLASS ACTION STATUS WAS LIMITED SOLELY TO BREACH OF CONTRACT CLAIMS AGAINST SSG AND THEIR AFFILIATES AS DISCUSSED MORE FULLY HEREIN." Notice of Pendency of Class Action (capitalization and emphasis in original).

one year after certification of the SSG contract class against the SSG defendants.

In fact, the class of claimants adverse to Merrill was never more than provisional *because* Merrill refused settlement with the remaining provisional class members. Now Merrill wants to, in effect, create a post-judgment certification of the class[12] -- a clear violation of Rule 23. The Ninth Circuit Court of Appeals recently recognized that post-judgment certification is not available to those defendants who seek summary judgment prior to certification and notice (with an opportunity to opt-out) to the class. *Schwarzchild v. Tse,* 58 F.3d 430 (9th Cir. 1995). "[W]hen defendants obtain summary judgment before the class has been properly certified or before notice has been sent, they effectively waive their right to have notice circulated to the class under Rule 23(c)(2); in such cases the district court's decision **binds only the named plaintiffs.**" *Id.* at 434 (emphasis added). Accordingly, Respondents' assertions to the contrary are clearly erroneous,[13] entitling Petitioners to relief.

Respondents really argue for an implied grant of jurisdiction over the Petitioners that extends far beyond the scope of jurisdiction specified in the SSG class notice. That is not only a plain violation of the Rule 23(c)(2) requirement of the "best notice practicable under the circumstances," but also a violation of the fundamental rights of class members. "The proposition that the notice called for by Rule 23(c)(2) involves due process considerations is essential to give binding effect to a decree in a class action can be traced to the Supreme Court's decision in *Mullane v. Central Hanover Bank and Trust Co."* See 7B Wright, Miller, Kane, *Federal Practice and Procedure*, §1786, p. 190.

---

[12] Merrill points out on p. 9 that they obtained summary judgment on the non-certified claims. But Merrill does not state against whom. The obvious answer is that Merrill, by its own choice, obtained judgment only against the named plaintiffs in an individual action. This is just Merrill's oblique attempt to obtain a post-judgment class certification under the guise of "virtual representation".

[13] *Schwarzchild,* as well as the cases cited in the original Petition at pages 14-21, flatly contradict Respondents' contention that the Sixth Circuit's holding is not in conflict with any other decision of any other court.

Accord, In Re Nissan Motor Corp. Antitrust Litigation, 552 F.2d 1088 (5th Cir. 1977). As the authors conclude: "[T]he rule itself, by calling for the 'best notice practicable under the circumstances' and requiring that notice be given on an individual basis to identifiable members of the class, appears to have been drafted with this constitutional point in mind." Wright at 191. In essence, personal jurisdiction over Rule 23(b)(3) class members is only by consent. *Compare* FED. R. CIV. P. 4(k). That consent cannot be construed to allow claims against defendants who were never included in the notice provided to class members.

Finally, Respondent LeHill Partners' ("LeHill") desperate reliance on a brief authored in 1989 (for trial proceedings in Florida) cannot save their theory of implied jurisdiction.[14] LeHill's quote from that brief is quite cynically taken out of context. A final resolution in a properly certified class action arguably would have *res judicata* effect on those members of the class (who did not request exclusion) with regard to those issues actually litigated. What LeHill neglects to inform the Court, however, is that the proceedings in this case did not unfold as anticipated: there was a final resolution as to the class only in the limited SSG contract case binding only the SSG plaintiffs and the SSG defendants. There was no class certification in the *Becherer* proceedings against certain other defendants.[15] Thus, while the brief's author justifiably argued in 1989 that the judgment in the pending class action suit could feasibly bar further litigation, that prediction was premised on full class certification of all claims against all defendants. When the premise supporting the conclusion failed to come to fruition, the conclusion likewise failed.

CONCLUSION

Review of this Petition is necessitated by the District Court's extensive disregard of Due Process and First Amendment Guarantees. The issues presented by the District Court's and Circuit Court's unprecedential extension of the theory of "virtual representation" are now fully framed and ripe for appellate review.

---

[14] Initially, it should be noted that the brief LeHill relies on is not a part of the record in the instant case. Furthermore, the Florida appellate court did not rely on the quoted section in reaching its holding. *Dykes v. Trustbank Savings F.S.B.*, 567 So.2d 958 (Fla. App. 1990).

[15] See chart, Appendix B.

BARRIS, SOTT, DENN & DRIKER, P.L.L.C.

By:_____

Sharon M. Woods
(Counsel of Record)
Daniel J. LaCombe
Monique K. Cirelli
Co-Counsel for Petitioners
211 West Fort Street, 15th Floor
Detroit, MI 48226-3281
(313) 965-9725

Thomas R. Grady
Co-Counsel for Petitioners
GRADY & ASSOCIATES
3411 Tamiami Trail North, Suite 200
Naples, Florida 33940
(813) 261-6555

DATED: September 12, 1995

No. 94-1968

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

J. DON ADAMS, et al.,
Petitioners,

v.

MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,
Respondents.

APPENDIX

Sharon M. Woods
(Counsel of Record)
Daniel J. LaCombe
Monique K. Cirelli
Co-Counsel for Petitioners
BARRIS, SOTT, DENN & DRIKER, P.L.L.C.
211 W. Fort Street, 15th Floor
Detroit, MI 48226-3281
(313) 965-9725

Thomas R. Grady
Co-Counsel for Petitioners
GRADY & ASSOCIATES
3411 Tamiami Trail North, Suite 200
Naples, Florida 33940
(813) 261-6555

APPENDIX
TABLE OF CONTENTS

PAGE

Appendix A
Document Request To Thomas Grady 1a

Appendix B
Chart 1b

APPENDIX A

Document Request To Thomas Grady

DOCUMENT REQUEST TO THOMAS GRADY

Definitions and Instructions

A. **"Document"** shall include any information-bearing medium, including but not limited to paper, audio and videotape, photographic film, and any computer readable medium.

B. **"Counsel"** means Elwood Simon, Bruce Gerstein and/or Eugene Spector, any law firms with which they are or were associates, and any other lawyers employed by or otherwise associated with those firms.

C. **"Grady"** means Thomas Grady, any law firm with which he is or was associated, and any other lawyers employed by or otherwise associated with those firms.

D. **"The Litigation"** means *Becherer, et al. v. Merrill Lynch, Pierce Fenner and Smith, et al.*, Case No. 89-CV-75202-DT (the **"Becherer Lawsuit"**) or *Adams et al. v. Merrill Lynch, Pierce Fenner and Smith, et al.*, Case No. 92-2776-Co-01 (Collier County, Florida).

E. **"Named Plaintiffs"** means Richard C. Becherer, Lawrence M. Richard, Robert A. Horvath, Henry V. Denolf and Joann L. Denolf, individually or collectively.

F. **"AUO"** means the Association of Unit Owners of the Registry Hotel at Pelican Bay, Inc.

G. **"AUO" Board"** means the board of Directors of the AUO.

H. **"AUO Meeting"** means a formal or informal meeting or conference (whether in person or by telephonic or other means) of the AUO Board or any of its members, any committee or sub-committee of the AUO or the AUO Board (including any advisory committee or board), or the AUO membership.

I. **"Investigation"** means any investigation relating to the Registry Hotel at Pelican Bay conducted by, at the director of, or in cooperation with Counsel, including but not limited to the investigation referenced on the first page of the Complaint in the Becherer Lawsuit and the "Compliance Review" referenced at the August 14, 1989 AUO meeting.

J. If you object to furnishing any document requested herein on grounds of privilege or otherwise, identify each document withheld and the basis for withholding it.

DOCUMENTS TO BE PRODUCED

1. Video or audio tapes, written transcripts, minutes or other record of any meeting referring or relating to the Investigation or the Litigation between Grady and:

a) any Unit Owner;

b) Counsel:

c) the AUO Board, any of its board members or officers, or its counsel.

2. Notes, memoranda or other documents which summarize or reflect any meeting referring or relating to the Investigation or the Litigation between Grady and:

a) any Unit Owner;

b) Counsel;

c) the AUO Board, any of its board members or officers, or its counsel.

3. Interim, draft or final reports, memoranda, correspondence and other documents summarizing or reflecting all or any part of the Investigation, including but not limited to:

a) Interim Report 1 prepared in December 1988;

b) the report of Counsel referenced in the May, 1989 AUO meeting; and

c) the "independent damage analysis" referenced at the May, 1989 AUO meeting.

4. Correspondence, reports, memoranda, notes, and other documents regarding or reflecting:

a) the decision to undertake the Investigation.

b) the subject matter, scope and conduct of the Investigation.

c) the decision to institute the Becherer Lawsuit.

d) the choice of forum for the Becherer Lawsuit.

e) the selection of parties plaintiff and defendant in the Becherer Lawsuit.

f) the decision to file the Becherer Lawsuit as a class action.

g) the selection of counsel to handle the Becherer Lawsuit.

h) the financing of the Litigation, including the payment of fees. costs and expenses associated with the Litigation.

i) the persons with authority to make decisions regarding the Becherer Lawsuit.

j) efforts, negotiations or proposals to settle all or a part of the Becherer Lawsuit.

k) the selection or compensation of experts, consultants, advisors or other persons who provided services in connection with the Investigation or the Becherer Lawsuit.

l) the status or progress of the Becherer Lawsuit.

5. Correspondence, memoranda, notes, and other documents transmitting or seeking review, comments or approval of pleadings or any other papers filed or proposed to be filed in or used in connection with the Becherer Lawsuit.

6. Drafts of pleadings or papers filed or proposed for filing in the Becherer Lawsuit.

7. Documents relating to the Investigation or the Litigation which reflect communications between:

a) any Unit Owner and the AUO, any AUO Board member or officer, or any attorney representing the AUO;

b) Counsel and the AUO, any AUO Board member or officer, or any attorney representing the AUO;

c) Grady and the AUO, any AUO board member or officer, or any attorney representing the AUO;

d) Grady and Counsel.

8. Documents relating to any foreclosure proceeding regarding any interest in the Registry Hotel which reflect communications between:

a) Counsel and the AUO, any AUO Board member or officer, or any attorney representing the AUO;

b) Counsel and Grady;

c) Grady and the AUO, any AUO Board member or officer, or any attorney representing the AUO.

9. Documents relating to any other lawsuit or arbitration proceeding relating to the Registry Hotel (other than the Litigation and the foreclosure proceedings referred to in the preceding Requests) which reflect communications between:

a) Counsel and the AUO, any AUO Board member or officer, or any attorney representing the AUO;
b) Counsel and Grady;
c) Grady and the AUO, any AUO Board member or officer, or any attorney representing the AUO.

10. Documents which reflect or relate to recommendations or advice given to any Unit Owner by any person other than Grady regarding the selection of counsel in connection with the foreclosure proceedings referred to in the preceding Requests.

11. The "monthly updates" referenced in Grady's February 21, 1992 memo to his "Registry Clients."

12. Correspondence, memoranda, reports and other documents relating to the Investigation or the Litigation which reflect or constitute communications between the AUO, Counsel, Grady, Quareles & Brady or any other attorneys, the AUO Board or any of its members and:
a) Arthur Anderson;
b) Coopers & Lybrand;
c) Stanley Blumin;
d) Grant Thornton;
e) Phillip Levin;
f) any other expert, consultants or advisor retained or providing service in connection with the Becherer Lawsuit.

13. Time records, summaries, billing slips, calendars, diaries or similar documents describing services provided in connection with the Investigation or the Litigation by Grady.

14. Cancelled checks, check registers, cash receipts journals or other documents reflecting amounts paid to Grady

by the AUO, any AUO Board member or officer, or any attorney representing the AUO in connection with the Investigation or the Litigation.

15. Cancelled checks, check registers, cash receipts journals or other documents reflecting amounts paid to Grady by Counsel or by Grady to Counsel in connection with the Investigation or the Litigation.

APPENDIX B

Chart

ACTION AND ISSUES:	PLAINTIFFS:	DEFENDANTS:
SSG CONTRACT ACTION ("Case I") (Decided After Bench Trial)	**SSG PLAINTIFFS** (includes entire certified class, including **Petitioners** and the named *Becherer Plaintiffs)*	Can-American Corporation, Can-American Realty Corporation, Shelter Seagate Corporation, Garrett G. Carlson, Graham C. Lount, and Arni Thorsteinson
FRAUD AND SECURITIES CLAIMS ("Case II") (Decided upon Defendants' Motion for Summary Disposition)	THE ***BECHERER*** PLAINTIFFS: Richard Becherer, Lawrence Milton Richard, Robert A. Horvath, Shirley Horvath, Henry Denolf and Joann Denlof.	**Merrill Lynch, Pierce Fenner & Smith, Incorporated;** Frank Lavin, Martin Cicco, Laventhol & Horwath, **Dominion Financial & Investment Corp., n/k/a Trustbank Mortgage Center, Inc.**, M.A. Mortenson Company, Winsor/Faricy Architects, Inc., and Midwest Title Guarantee Company of Florida